



# Spokane Tribe of Indians

P.O. Box 100 • Wellpinit, WA 99040 • (509) 458-6500

January 6, 2012

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Office Of The Executive

Dennis McLerran  
Regional Administrator  
United States Environmental Protection Agency  
Region 10  
1200 Sixth Avenue, Suite 900  
Seattle, Washington 98101-3140

## Re: Idaho Proposed Fish Consumption Rate

Dear Regional Administrator McLerran:

The Spokane Tribe of Indians ("Tribe") wishes to express its concerns about the Environmental Protection Agency's ("EPA") pending action on Idaho's proposed fish consumption rate ("FCR") of 17.5 grams/per day. To date, the Tribe's technical and legal staff has participated in one group conference call and one private call with your technical staff to discuss the issues that are posed by Idaho's proposed FCR. These discussions have not been elevated to the level of formal consultation, and at this time the Tribe believes that formal consultation is unnecessary because there is no valid legal footing for EPA approval of Idaho's proposed 17.5 grams/per day criteria. The following reasons provide the foundation for the Tribe's position.

First, the Tribe's current approved FCR is 86.3 grams/per day. As you are aware, EPA regulations require the following for State water quality standards: "In designating uses of a water body and the appropriate criteria for those uses, the State **shall** take into consideration the water quality standards of downstream waters and **shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.**" 40 C.F.R. § 131.10(b). If Idaho's proposed 17.5 grams/per day were approved, those standards would fail to comply with this regulation. The Tribe's waters are roughly forty river miles from the Idaho border and persistent mining pollution and manmade toxics discharged in Idaho easily reach the Tribe's waters, contributing to the violation of the Tribe's water quality standards and infringing on the Tribe's reserved fishing rights and use of its waters.

Second, EPA's NPDES permit regulations state that a permit cannot be issued "when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of **all affected States**." 40 C.F.R. § 122.4(d). The Tribe is considered a State under these regulations by way of its TAS status. It is clear to the Tribe that if NPDES permits are issued in Idaho utilizing a FCR of 17.5 grams/per day no permit could possibly ensure compliance with the Tribe's standards.

Third, approval of a fish consumption rate 17.5 grams/per day would be poor policy and it will lead to acrimony between all of the jurisdictions involved. On October 17, 2011, EPA approved Oregon's fish consumption rate of 175 grams per day after it had disapproved a 17.5 gram/per day proposal by Oregon in 2010. Currently, Washington has stated publicly that it will be pursuing a FCR during its water quality standard revisions between 157-267 grams/per day.<sup>1</sup> Along with the Tribe's current approved standard of 86.3 grams/per day this situation will become untenable if waters that Idaho shares with the three jurisdictions is allowed to have a FCR that fails to protect subsistence and heavy users of the fish resources within the shared waters. Furthermore, 17.5 grams per day is far below the EPA recommended 142.4 grams/per day for subsistence and heavy users of fish and water resources.<sup>2</sup> For this reason alone, EPA must disapprove the proposed Idaho FCR.

Fourth and finally, the EPA owes a trust duty to the Tribe. This duty requires that EPA follow its own regulations in this situation, and disapprove the Idaho submission.<sup>3</sup> Furthermore, EPA owes a duty above and beyond just its regulations, but a general duty to protect the Tribe's resources. Again, it is difficult for the Tribe to square this duty with approval of Idaho's FCR.

Accordingly, disapproval is the only appropriate action at this time and the Tribe's position is that there is no need for formal consultation until such time the disapproval decision is made. If you have any questions, feel free to contact B.J. Kieffer, Director, Spokane Tribe Department of Natural Resources at 509-626-4427 or Brian Crossley, the Water Resource Program Manager at 509-626-4409.

Sincerely,



Gregory J. Abrahamson  
Chairman  
Spokane Tribal Business Council

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<sup>1</sup> <http://www.ecy.wa.gov/pubs/1109050.pdf> (Page 7, Last Visited January 5, 2012).

<sup>2</sup> <http://www.epa.gov/compliance/ej/resources/policy/plan-ej-2014/ej-legal-tools.pdf> (Page 25, Last visited January 5, 2012).

<sup>3</sup> See *Pit River Tribe v. United States Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006).

Cc: **B.J. Kieffer**, Director, Spokane Tribe Department of Natural Resources  
**Brian Crossley**, Water Program Manager, Spokane Tribe Department of Natural Resources  
**Christine Psyk**, Associate Director Office of Water and Watersheds, US EPA  
**Mary Lou Soscia**, Columbia River Coordinator, US EPA  
**Ted Sturdevant**, Director, Washington Department of Ecology  
**Ted C. Knight**, Attorney, Spokane Tribe of Indians